BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 Petition of TON Services, Inc. for Declaratory Ruling of a Primary Jurisdiction Referral	CC Docket No. 96-128 REPLY OF DAVEL COMMUNICATIONS, INC., ET AL.

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TABLE OF CONTENTS

Page

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I. INTRODUCTION AND SUMMARY

Davel Communications, et al. ("Davel")[1] reply to Qwest's Further Opposition ("Further Opposition") filed on June 5, 2008, and briefly comment on the response of AT&T and Verizon.

Qwest's Further Opposition offers no material new facts. It is a rehash of arguments Qwest already made and lost before this Commission and in court, under the guise of something new. To the extent Qwest makes any new arguments, those arguments contradict Qwest's other statements in this docket.

As this reply will demonstrate:

- Qwest's cost study filings are irrelevant as they involve a service not at issue in this proceeding. The Commission should give them no weight or consideration.
- It is *res judicata* that the *Wisconsin Order clarified* Qwest's existing duties under the new services test but did not "significantly" modify them, as Qwest claims.[2]
- Qwest's claim that it complied with the filing requirements of the new services test from 1996 to 2002 is contradicted by its own statements to this Commission during that time that it did not have to comply with the new services test.
- It is *res judicata* that Qwest cannot self-certify compliance with the new services test, despite its claims.
- Qwest contradicts itself about whether it complied with the new services test and whether it must file cost data with the state commissions.

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[1] Davel Communications, et al., is a group of Payphone Providers that are parties to a pending *Petition of Davel Communications, Inc., et al., for Declaratory Ruling* ("Petition") in this docket filed on September 11, 2006, and a proceeding against Qwest before the Ninth Circuit, which is captioned *Davel Communications, et al. v. Qwest* (the "*Davel Case*"). The Petition describes the *Davel Case* in greater detail.

[2] *In the Matter of Wisconsin Public Service Commission, Order Directing Filings*, 17 FCC Rcd. 2051 (2002) ("*Wisconsin Order*"); *see Order on Reconsideration*, 11 FCC Rcd. 21,233 at ¶ 163 ("*Order on Reconsideration*"); *see also* 47 C.F.R. § 61.49(h).

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- No relevant final state orders hold that Qwest's Basic PAL or fraud protection rates met the new services test.

Even Verizon and AT&T distance themselves from Qwest's behavior in their companion filing, noting that they, unlike Qwest, filed new cost studies with state Commissions before May 19, 1997. *See Comments of AT&T and Verizon* (June 4, 2008). The Commission should reject Qwest's after-the-fact excuses for its refusal to comply with the new services test and instead enforce Section 276 of the Telecommunications Act and the orders in this docket.

II. QWEST'S COST FILINGS ATTACHED TO THE FINAL ORDER ARE IRRELEVANT

Qwest's Further Opposition contains reams of irrelevant cost data created before the *Wisconsin Order*. The Commission can ignore this cost data for the following four reasons.

A. The Commission can ignore the cost studies because they were prepared before the 2002 *Wisconsin Order*

The 2002 *Wisconsin Order* summarizes the Commission's new services test precedent, as explained below in Section III. The Further Opposition admits that Qwest was "forced" to completely revise its cost studies after the *Wisconsin Order*, because it is cost studies did not comply with that order. Accordingly, every Qwest cost study predating the *Wisconsin Order* is erroneous by Qwest's own admission and should be disregarded by this Commission.

B. The Commission can ignore Qwest's cost studies analyzing "Smart PAL," which is not relevant

Qwest's Further Opposition cost studies analyze **Smart PAL**. Davel has never ordered Smart PAL, it is not part of Davel's case, and it is not part of TON's case to

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Davel's knowledge. Basic PAL and Smart PAL are different services with different functions and different provisions in Qwest tariffs. The Further Opposition itself concedes this point by stating that "Smart PAL services use additional central office coin functionality" compared to Basic PAL, although that is only one of the differences. *Further Opposition* at 4, n.12. Likewise, this Commission recognizes that Smart and Basic PAL are not the same service. *Order*, 12 FCC Rcd 4793 at n. 16 (1997)(discussing the differences between Smart and "dumb"/Basic PAL). The Commission can ignore cost studies analyzing Smart PAL because they are not at issue anywhere, including this docket.

Qwest's effort to confuse the distinction between Smart and Basic PAL is a strategy to hide its failure to seek state commission approval of its Basic PAL rates for new services test compliance.

C. The Commission can ignore Qwest's cost studies because they do not contain overhead costs.

Qwest admits in the Further Opposition that it filed only TSLRIC line cost studies, which only cover the direct costs, not overhead costs. The new services test requires Qwest to file overhead cost data in addition to direct cost data, and the lack of overhead cost data means that the cost studies are fatally flawed and entitled to no weight. Under the new services test, Qwest must calculate its payphone services rates in a manner that does not "recover more than the direct costs of the service, plus 'a just and reasonable portion of the carrier's overhead costs.'" *Wisconsin Order* at ¶ 23. Qwest must file "cost-support data" with state commissions to support these rates. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation*

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Provisions of the Telecommunications Act of 1996, 12 FCC Rcd. 21370 at ¶ 18 (1997) ("*Waiver Order*").

Qwest never filed overhead cost data for Basic PAL or fraud protection, which are the payphone services relevant to Davel's petition. Similarly, the cost studies attached to the Further Opposition do not provide Qwest's overhead cost data for Basic PAL or fraud protection. They are thus unworthy of consideration, except as evidence of Qwest's misapplication of the law.

D. The Commission can ignore the Qwest cost studies because they were not filed with a state commission as part of a Basic PAL new services test proceeding.

As explained above, the new services test required Qwest to file complete cost data (including overhead costs) for Basic PAL rates with the state commissions, not the FCC, as part of a state commission proceeding to evaluate whether its Basic PAL rates meet the new services test. As Qwest is fond of arguing, the new services test is "flexible." Thus, its application—particularly as to overhead costs—requires policy evaluation and judgment, functions the Commission delegated to state commissions (in accordance with Commission orders in this docket), not to Qwest. The Commission also recognized that the states could not compare the existing Basic PAL rates with the requirements of the new services test unless Qwest filed its costs, including overhead costs, with the state commissions for review. Qwest failed both to file costs at the proper time (*i.e.*, after the clarifying order on April 4, 1997 and before May 19, 1997) and in proper form (*i.e.*, including overhead costs). Nor did Qwest ask any state to review its Basic PAL rates. Thus, Qwest's cost studies in the Further Opposition are entitled to no weight.

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It is not clear why Qwest is filing its irrelevant cost studies now with the Commission. If Qwest suggests that it evaluated rates in secret or as part of proceedings not involving Basic PAL, that does not meet the new services test requirements. Qwest made it impossible for a state commission to approve its Basic PAL rates by failing to file complete cost data or offering them for approval.

To Davel's knowledge, all of Qwest's cost studies submitted with the Further Opposition suffer from one or more of the above four deficiencies at a minimum. These cost studies are entitled to no weight and no consideration.

III. IT IS *RES JUDICATA* THAT THE *WISCONSIN ORDER* CLARIFIED THE NEW SERVICES TEST BUT DID NOT ALTER IT

Qwest seeks to avoid responsibility for opposing the new services test between 1997 and 2002 by alleging the Commission's 2002 *Wisconsin Order* "significantly modified the application of the new services test to payphone services," forcing Qwest to redo its payphone services cost studies completely. *See Further Opposition* (Thompson Dec.) at 2. This is a startling argument, because it admits the fact that Qwest's 1997 to 2002 rates did not comply with the New Service Tests and relies instead on a legal argument that Qwest has already lost several times (that *Wisconsin* "changed" the law).

It is *res judicata* that the *Wisconsin Order* clarified—not "significantly modified"—Qwest's new services test obligations by denying Qwest's far-fetched objections to it and giving states additional guidance about its application derived from its existing precedent, as this Commission, the D.C. Circuit, the Ninth Circuit and the Tenth Circuit already held.

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For example, this Commission stated in 2002 that the *Wisconsin Order* clarified but did not change the new services test:

> "In the [Wisconsin] Order released today . . . [t]he Commission affirmed its earlier conclusion that [RBOCs must] set their intrastate payphone line rates in compliance with the Commission's new services test .... Today's Order thus confirms the Commission's earlier decisions regarding pricing of intrastate payphone lines...."

See FCC Releases Payphone Orders, 2002 FCC LEXIS 537 (emphasis added). The Commission said that the *Wisconsin Order* was a clarification of the new services test again in 2004:

> "In a subsequent order [the *Wisconsin Order*] . . . the Common Carrier Bureau issued guidance clarifying application of the new services test for the benefit of state public service commissions."

In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, *Report and Order*, 19 FCC Rcd. 15,636 at ¶ 60 (2004) (emphasis added)." [3]

The Commission in the *Wisconsin Order* itself rejected Qwest's allegation that the *Wisconsin Order* and the underlying Bureau Order implemented new law requiring notice and comment:

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[3] It is now moot to argue over why the *Wisconsin Order* was a clarification of existing law, as the Commission and federal courts have held. Nevertheless, Davel notes that the Commission supported virtually every statement in the *Wisconsin Order* by citation to an earlier order on the new services test, showing that the *Wisconsin Order* was applying existing law rather than sharply departing from it as Qwest now asserts.

Further, the stated purpose of the *Wisconsin Order* was to help states to comply with existing law: "we believe that this Order will assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the Payphone Orders and Congress' directives in section 276." *Wisconsin Order* at ¶ 2 (*emphasis added*). The Commission did not state that it was revising the new services test, discarding it, creating it or doing anything other than help states understand how to apply it consistent with existing law.

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> "The Coalition claims that the Bureau order is a 'legislative rule' that must go through notice and comment. ... We disagree. The Bureau Order simply applies our existing authority."

Wisconsin Order, note 73 (emphasis added). This holding was upheld by the D.C. Circuit, making the issue *res judicata* as to Qwest and the Commission: "[We] affirm the Commission's order in all respects." *New England Public Comm. Comm'n v. F.C.C.*, 334 F.3d 69, 71-79 (D.C. Cir. 2003), *cert. denied*, *N.C. Payphone Ass'n v. FCC*, 541 U.S. 1009, 124 S. Ct. 2065, 158 L. Ed. 2d 618, 2004 U.S. LEXIS 3066, 72 U.S.L.W. 3672 (2004).

Qwest has tried to make the same "change of law" argument in two other Circuits and has had no better luck. For example Qwest argued vehemently that, "[i]n 2002, ***the FCC changed the meaning of the New Services Test as it applied to these services***." Brief of Appellee at 32 (emphasis Qwest's). The Ninth Circuit rejected Qwest's characterization:

> In 2002, in a decision subsequently affirmed by the D.C. Circuit, the FCC clarified the requirements of the new services test as it applies to the payphone industry, making it clear that, as in other areas in which it has been applied, the new services test requires forward looking, cost-based rates.

See Davel Communications, Inc. v. Qwest Corp., 460 F.3d 1075, 1083 (9th Cir. 2006)(emphasis added).

The 10th Circuit also agreed that the *Wisconsin Order* clarified existing law:

> "The FCC ultimately clarified that, in the context of PAL tariffs, the NST requires a forward-looking, cost-based methodology that prohibits BOCs from charging "more for payphone line service than is necessary to recover from PSPs all monthly recurring direct and overhead costs incurred by BOCs in providing payphone lines." In re Wisconsin Public Service Commission, Order Directing Filings, 17 F.C.C.R. 2051, 2069 ¶ 60, 2002 WL 122570 (2002) ("New Services Test Order")."

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TON Services, Inc. v. Qwest Corporation, 493 F.3d 1225, 1230 n.7 (10th Cir. 2007) (emphasis added).

The preclusive effect of these holdings by the Commission and federal courts establish that the *Wisconsin Order* was a clarification of existing new services test law, not a "significant modification" of it. Qwest was thus obligated to follow the new services test from the first time it applied to payphone services, notwithstanding the clarifications in the *Wisconsin Order*. It is well settled that "[a] rule clarifying an unsettled or confusing area of the law 'does not change the law, but restates what the law according to the agency is and has always been . . .'" *Orr v. Hawk*, 156 F.3d 651, 654 (6th Cir 1998). A clarifying order "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'" *Id.* at 654; *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993); *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 135, 80 L. Ed. 528, 56 S. Ct. 397 (1936).

There is nothing "retroactive" about Qwest compensating Davel for Qwest's violation of the new services test and Section 276(a) from 1997 to the issuance of the *Wisconsin Order*. The Commission routinely issues orders that clarify the application of an existing rule and may even punish parties that violated that rule. Before these orders are issued, the violator typically asserts that the law does not apply to them or that the law was unclear, but they must pay the consequences nonetheless. This situation is no different.

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IV. QWEST'S CLAIMS THAT IT COMPLIED WITH THE NEW SERVICES TEST FROM 1996 TO 2002 ARE CONTRADICTED BY ITS OWN STATEMENTS TO THIS COMMISSION

Qwest asserts that it was following the new services test with care from 1996 to 2002, but Qwest's actions contradict that claim.[4] During that period, Qwest attacked the new services test from every angle before this Commission, including claiming among other things that:

- The FCC could not apply the new services test to intrastate payphone line rates. *Wisconsin Order* at ¶ 28
- "[T]he Commission lacked the jurisdiction under section 276 to issue the Bureau Order in the first place and that, in any event, it violates the Tenth Amendment." *Wisconsin Order* at ¶ 28
- Qwest has "virtually unlimited flexibility in determining the overhead component of payphone line service rates." *Wisconsin Order* at ¶ 55
- "[A]ny overhead loading a BOC might choose is 'reasonable' for purposes of the new services test so long as it is justified by 'some plausible benchmark.' *Wisconsin Order* at ¶ 55.

The *Wisconsin Order* rejected all these arguments, and Qwest is precluded from re-litigating them. The Commission held that Qwest's obligation to comply with the new services test went back to 1996 and added that "[w]e have *not* simply accepted any "plausible benchmark" proffered by a BOC." *Wisconsin Order* at ¶ 56.

Qwest's claim that its Basic PAL rates and cost studies were in compliance with the new services test "from the beginning" in 1996 (See *Further Opposition* at 4) is further contradicted by its own statements in 1997, when it argued to the Commission that the new services test did not apply to payphone services: "[T]he payphone orders do

[4] *See Further Opposition* at 4.

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not by their terms require that the States apply the federal "new services test" to existing state-tariffed services like COCOT [PAL] lines." *RBOC Coalition Ex Parte Letter*, Docket No. 96-128 at 6 (April 3, 1997).

Ultimately, whatever version of the "new services test" Qwest used prior to the 2002 *Wisconsin Order* is wrong by Qwest's own admission in the Further Opposition and entitled to no weight.

V. QWEST CONTRADICTS ITSELF ABOUT WHETHER IT HAD TO FILE COST DATA WITH THE STATE COMMISSIONS

Qwest still cannot decide whether it did or did not have to file cost data. Qwest now claims in the Further Opposition that "[i]n 1997, Qwest filed Basic PAL and Smart PAL cost information with its tariff filings in multiple states." *Further Opposition* at 3. But Qwest told the Commission the opposite story in 2007, when it insisted that it did not file or have to file Basic PAL cost studies with the states:

> "It was clear from the certifications that Qwest had not filed additional tariffs or cost studies with state regulators for its existing payphone access rates (as now demanded by Davel)."
>
> "Accordingly, because its payphone access rates were already consistent with the new services test, Qwest did not file any new intrastate tariffs or rate justifications for payphone access lines purchased by competitive payphone providers."
>
> "…Qwest did not file cost support with state regulators in April of 1997…."
>
> "The 'filing requirement' posited by Davel never existed…."

Qwest FCC Ex Parte Submission, Docket 96-128 at 2, 4, 9, and 10 (May 17, 2007).

Similarly, Qwest stated that:

> The Commission did not require BOCs relying on existing payphone compensation tariffs to file anything new with the states by 1997, including new tariffs or new cost support information.

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Qwest FCC Ex Parte Submission, Docket 96-128 at 1 (Sept. 26, 2007).

Qwest's assertion that cost data filings were not required is legally wrong (as Davel has asserted previously), but is important to illustrate that Qwest is willing to take conflicting positions as temporary expediency dictates.

Even AT&T and Verizon are distancing themselves from Qwest's failure (or refusal) to file costs for existing services after the Bureau clarified they had to comply with the new services test. AT&T and Verizon note that it was their own "practice to submit to state commissions, by May 19, 1997, either new tariffs or cost data to demonstrate that existing tariffs were compliant with the requirements of the *Payphone Orders*, including the new-services-test pricing standard" and "take no position" about issues regarding Qwest's failure to do so. *AT&T and Verizon Ex Parte*, Docket No. 96-128 at 8 (June 4, 2008)(emphasis added). Qwest's constantly shifting positions about cost filings comply only with its strategy of the moment, not the law.

VI. IT IS *RES JUDICATA* THAT QWEST CANNOT SELF-CERTIFY COMPLIANCE WITH THE NEW SERVICES TEST

Qwest claims that "Qwest's interpretation of the Commission's rules . . . allowed it to evaluate its rates internally for NST compliance." *Further Opposition* at 6. Qwest is wrong again. The Commission held years ago that Qwest could not self-certify compliance with the new services test:

> "Determination of the sufficiency of the LEC's [new services test] compliance . . . . is a function solely within the Commission's and state's jurisdiction."

In the Matter of Ameritech, *Memorandum Opinion and Order*, 14 FCC Rcd 18643 at ¶ 27 (1999) ("*Ameritech*"). The 10th Circuit in the TON case agreed:

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> "Actual compliance [with the new services test], in contrast, requires the submission of cost data to regulators and the receipt of state regulators' approval that tariff rates comply with the NST. *See, e.g.,* 47 C.F.R. § 61.49(g)(2); Order on Reconsideration, 11 F.C.C.R. at 21308 ¶ 163."

TON Services, 493 F.3d at 1241 n. 18 (emphasis added); See also *TON Services*, 493 F.3d at 12, 14.

This is a rehash of a similar losing argument by Qwest many years ago, in which it claimed that its "self-certification" of new services test compliance for purposes of dial-around compensation was sufficient to establish new services test compliance.

> "Contrary to Qwest's assertion that its "certification" to MCI for the purposes of receiving per-call compensation satisfied this burden, the FCC's orders make clear that BOCs bear a much higher burden to demonstrate actual NST compliance under paragraph 163 of the Order on Reconsideration than they do to "certify" compliance under paragraph 131. *See In re Bell Atlantic-Delaware*, 17 Commc'ns Reg. at ¶¶ 3, 28; *compare* Order on Reconsideration, 11 F.C.C.R. at 21294 ¶ 131, *with id.* at 21308 ¶ 163. . . .

Id. at 1241 n.18. This is yet another issue that has been resolved as *res judicata* against Qwest.

VII. NO RELEVANT STATE ORDERS HOLD THAT QWEST'S PAYPHONE RATES MET THE NEW SERVICES TEST, DESPITE QWEST'S CLAIMS

Qwest claims that state PUCs held that its Basic PAL rates met the new services test prior to the 2002 *Wisconsin Order*, but this is false as to the eleven states at issue before the Commission. The state commission proceedings cited by Qwest dealt with irrelevant issues such as Smart PAL or never discussed the new services test at all. These are the same misrepresentations that Qwest has made about the state PUC proceedings in filings with this Commission for the last two years, including ex parte filings dated September 5, 2006, on May 17, 2007, and September 26, 2007.

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Here is the correct history of the state PUC decisions:

- Arizona – *No relevant Arizona Corporation Commission order holds that Qwest's fraud protection rates meet the new services test.*[5]

  The Further Opposition cites a 1998 settlement regarding Arizona Basic PAL rates, which are currently excluded from this case. *Id.* (Thompson Dec.) at 16.

- Colorado – *No final Colorado PUC order held that Qwest's rates meet the new services test.*

  The Further Opposition admits that the CPUC held in 1999 that Qwest's Basic PAL and features rates were priced too high, ordered a reduction, and held the case open for further reduction: "[I]f the FCC issues future specific directives regarding the pricing of payphone service, USWC will be directed to submit appropriate and timely filings with this Commission to comply with such directives." *CPA v. US* WEST, 1999 WL 632894 at ¶ 10. *Id.* (Thompson Dec.) at 40.

  The CPUC staff reopened new service test compliance in 2002, sending Qwest a letter to "show cause" why the CPUC should not take action against Qwest for its failure to comply with the new services test, which specifically mentioned that the CPUC staff considered refunds to be a potential remedy. Because Qwest voluntarily complied in 2002, there was no further CPUC order.

- Idaho – *No relevant Idaho PUC order holds that Qwest's rates meet the new services test.*

  The Further Opposition cites a Smart PAL tariff filing, but Davel does not order Smart PAL. *Further Opposition* at 18.

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[5] Davel has not made claims for PAL refunds under the *Waiver Order* for Arizona, Montana, or Oregon. However, Davel does have a claim for Qwest's failure to file "fraud protection" costs with all states, including Arizona. Also, if the court permits amendment of its complaint when the district court litigation resumes, Davel may assert claims under Section 276 for damages for Qwest's unlawful discrimination in Arizona and Montana. While commissions in those two states issued orders, they were pursuant to settlements which specifically precluded the parties, including Qwest, from using the results in those cases in other proceedings. *See, e.g.* Thompson Declaration, Exhibit A, Arizona Settlement Agreement § H. The District Court can decide if the order Qwest relies on should have preclusive effect notwithstanding that provision.

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Qwest's minor payphone rate revisions prior to the *Wisconsin Order* involved "de-averaging" and "expansion of local free calling areas," not the new services test.

- Iowa – *No relevant Iowa PUC order holds that Qwest's rates meet the new services test.*

  The Iowa Utilities Board proceeding cited in the Further Opposition did not hold that Qwest's rates met the new services test. *See Re Payphone Services*, 1999 WL 686075 (Iowa U.B.).

  In that case, the Board rejected a request by a payphone service provider to review Qwest's Basic PAL rates because the Board did not want to conduct "single-service rate cases" and because the payphone service provider's request was "non-specific and unsupported." The ruling was based solely on procedural deficiencies of the payphone service provider's request, not on the legality of Qwest's rates.

- Minnesota – *No relevant Minnesota PSC order holds that Qwest's rates meet the new services test.*

  The Minnesota PSC proceeding cited in the Further Opposition involves Smart PAL, which the Plaintiffs do not order and is irrelevant to this case. *Id.* (Thompson Dec.) at 19.

- Nebraska – *No relevant Nebraska PSC order holds that Qwest's rates meet the new services test.*

  The Further Opposition cites no Basic PAL new services test orders. Instead, Qwest cites a 2004 Nebraska Public Service Commission order that was part of a proceeding initiated after the *Wisconsin Order*. *Id.* (Thompson Dec.) at 46.

- New Mexico – *No relevant New Mexico State Corporation Commission order holds that Qwest's rates met the new services test.*

  The 1997 order cited in the Further Opposition involves Smart PAL, which the Plaintiffs do not order and is irrelevant to this case. *Id.* (Thompson Dec.) at 24.

- North Dakota – *No relevant North Dakota PUC order holds that Qwest's rates meet the new services test, which Qwest does not dispute.*

  Qwest evidently agrees, as it cites no such orders in the Further Opposition.

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- South Dakota - *No relevant South Dakota PUC order holds that Qwest's rates meet the new services test.*

  Qwest's rate reductions prior to the *Wisconsin Order* involved "Smart" PAL, as shown by the quotation contained in the Further Opposition. *Id.* at 27. The Plaintiffs purchase "Basic" PAL, not "Smart" PAL. Smart PAL is not relevant to this proceeding.

- Utah – *No relevant Utah PSC order holds that Qwest's rates meet the new services test.*

  Qwest's rate reductions prior to the *Wisconsin Order* involved Utah state law, not the new services test.

  Qwest admits that the order cited in the Further Opposition "did not decide issues specifically related to the FCC's Payphone Orders." *Id.* (Thompson Dec.) at 25.

- Washington – *No relevant Washington UTC order holds that Qwest's rates meet the new services test.*

  The WUTC order cited by Qwest in the Further Opposition involved access charge rates which Davel does not order. *Id.* (Thompson Dec.) at 28. Qwest cites no orders holding that its Basic PAL rates meet the new services test.

- Wyoming - *No relevant Wyoming PUC order holds that Qwest's rates meet the new services test.*

  The Further Opposition cites no orders holding that Qwest's Basic PAL rates meet the new services test.

  As is clear from the Further Opposition, Qwest's rate adjustments prior to the *Wisconsin Order* were based on the Wyoming Telecom Act, not the new services test. *Id.* (Thompson Dec.) at 51.

  The other states mentioned in the Further Opposition are not part of Davel's case.

Despite the irrelevance of Smart PAL, Qwest attempts to inject it into this case. Qwest claims that state commissions approving Qwest's "Smart" PAL rates actually also approved its "Basic" PAL rates, even though the orders do not analyze Basic

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PAL and Basic PAL was never an issue in those proceedings. *See Further Opposition* at 4.

Qwest's argument is contrary to basic administrative procedure and common sense. The filings and PUCs orders only discussed and made rulings regarding Smart PAL and did not address Basic PAL, so their findings are limited to Smart PAL.[6] The truth is implicitly disclosed in Qwest's Further Opposition: Qwest did not file costs under—and the state PUCs did not review Qwest's pre-existing Basic PAL tariffs under—the new services test until 2002-2003.

VIII. THE COMMISSION SHOULD ISSUE AN ORDER ON THE DAVEL PETITION AS SOON AS POSSIBLE

No barriers prevent the Commission from resolving the Davel Petition now. The Commission has heard legal argument from both Davel and Qwest for years. Qwest has offered nothing new on Davel's Petition. Qwest just continues to recycle its old, previously rejected arguments, and attaches even more irrelevant information to create the appearance of something new.

Qwest hopes that the Commission will set aside any existing draft order and spend its time rooting through the irrelevant information contained in the Further Opposition. The Commission need not do so even as to the TON Petition, let alone the Davel Petition. The Commission does not need to resolve any issues of fact, which are for a jury to decide in the Davel's District Court case against Qwest. Accordingly, the Commission should issue an order on the Davel Petition as soon as possible and,

[6] Moreover, Davel likely would not have had standing to participate in the state proceedings evaluating Qwest's Smart PAL rates, since they do not order that service.

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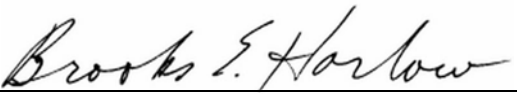
assuming for the sake of argument that it needs to decide facts for the TON court, the Commission should do so in a subsequent order.

IX. CONCLUSION

The Further Opposition is remarkable only in its gigantic volume, not in the quality of its legal argument. The Commission has heard almost all the Further Opposition's specious arguments before, albeit in a more concise form. There is nothing new of relevance in Qwest's Further Opposition, and the Commission should give it no weight.

DATED this 16th day of June, 2008.

MILLER NASH LLP



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